Reg. No. GR/RNP/GOA/32

RNI No. GOAENG/2002/6410

Panaji, 22nd February, 2007 (Phalguna 3, 1928)

SERIES II No. 47

OFFICIAL GAZETTE

GOVERNMENT OF GOA

SUPPLEMENT

GOVERNMENT OF GOA

Department of Labour

—

Notification

No. 28/6/2005-LAB/507

The following Award passed by the Industrial Tribunal of Goa, at Panaji-Goa on 19-7-2006 in reference No. IT/91/2000 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Hanumant T. Toraskar, Under Secretary (Labour).

Porvorim, 3rd August, 2006.

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IN THE LABOUR COURT – II
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Suhas Naik, Hon'ble Presiding Officer)

Ref. No. IT/91/2000

Shri Rishikesh Gauthankar,
LMG-101, Housing
Board Colony,
Alto Porvorim. ... Workman/Party I

V/s

The Managing Director,
M/s. Hotel Mandovi,
D. B. Bandodkar Marg,
P. O. Box No. 164,
Panaji, Goa. ... Employer/Party II

Workman/Party I – Represented by Adv. Shri C. J. Mane.

Employer/Party II – Represented by Adv. Shri B. G. Kamat.

dated: 19-7-2006.

AWARD

The Government of Goa by order dated 24-11-2000 bearing No. IRM/CON/67/99 referred the following dispute for its adjudication:

"(1) Whether the action of the management of M/s. Hotel Mandovi, in terminating the services of Shri Rishikesh Gauthankar, Clerk, with effect from 6-7-1999, is legal and justified ?

(2) If not, to what relief the workman is entitled ?"

2. On receipt of the reference a case was registered under No. IT/91/2000 and registered A. D. notices were issued to the parties. Pursuant to the notices by parties remained present before the court and the workman/ /Party I (for short "workman") filed his statement of claim at Exb. 4. The facts of the case in brief as pleaded by the workman are that he was employed with the Employer/Party II (for short "employer") with effect from 26-10-1987 as a 'Trainee Clerk' and that he was confirmed in his services by letter dated 1-1-1989. That the workman was promoted to the post of "Senior Clerk" by letter dated 5-5-1994 and after six months the workman was working as a Room Service Incharge with employer. That he applied for leave from 8-4-1999 to 7-5-1999 and the same was sanctioned to him by the employer. That he fell sick during the first week of May, 1999 and he sent a telegram on 8-5-1999 to the employer seeking extension of leave. That the extension of leave was refused to him by the employer on the ground of exigencies of work and that the same was informed to him by the employer vide telegram which was received by him on 12-5-1999. That after few days he met Mr. Kulkarni, the then Restaurant Manager of the employer and informed him that he was suffering from back-ache and pain in the spinal cord and he was unable to report for the duty immediately. That the said Mr. Kulkarni informed him to resume for work after recovering from his sickness with a medical certificate. That the workman recovered fully and

reported for duty on 26-9-1999. That on 26-9-1999 when the workman reported for work he found that his attendance card was removed from the rack and was not permitted to resume for his duties. That immediately, he met Mr. Kulkarni, the Restaurant Manager who in turn asked him to meet the Personal Manager. That when he went to meet the said Personal Manager, the said Personal Manager informed the workman that he was busy and told the workman to come on the next day. That when the workman went on the next day the Personal Manager did not meet the workman and the workman was told that he would be sent a written communication for resuming duties subsequently. That on 2-7-1999 he received a letter from the Employer stating that "as per Clause (6) of the confirmation letter dated 1-1-1989 his services automatically came to an end with effect from 6-7-1999 on account of his confined absence from 8-5-1999". Along with the said letter the employer enclosed a cheque of Rs. 39,504 towards notice pay and compensation. It is the case of the workman that the termination letter dated 2-7-1999 terminating his services with effect from 6-7-1999 is illegal and unjustified and bad in law. The workman prayed for reinstatement with full back wages and continuity in service.

3. The employer filed written statement at Exb. 5 In the written statement, the employer stated that the employer is a hotel establishment situated at Panaji, which is owned by the company under the name 'Mandovi Hotels Pvt. Ltd., The employer stated that the workman was appointed as a 'Trainee Clerk' with effect from 26-10-1987. The employer stated that initially the workman was appointed as 'Trainee Clerk' with effect from 26-10-1987 for a period of 3 months, in terms of the contract of Apprenticeship dated 26-10-1987 between the employer and the workman, which was extended for a further period of 3 months under employer letter dated 26-1-1988. That on completion of the aforesaid training period, the workman was appointed to the post of 'Clerk' on probation for a period of 6 months with effect from 1-3-1988, which was extended for a further period of 3 months under employer letter dated 9-9-1988. That on completion of the aforesaid probation period the workman was confirmed in the same post vide letter dated 1-1-1989. Thereafter the workman was promoted to the post of 'Senior Clerk' with effect from 1-4-1994 vide letter dated 5-5-1994 and continued working in the said post till the date of termination of his services. That the letter of confirmation dated 1-1-1989 was accepted by the workman.

The employer further stated that the workman applied for privilege/earned leave for a period commencing from 8-4-1999 till 7-5-1999, which was sanctioned by the employer. That on or about 10-5-1999, the employer received a telegram from the workman, where under workman sought extension of leave on account of "personal work". That the employer due to exigencies of the work, refused the extension of leave as sought by the workman and informed the workman to report for his duties immediately and the same was communicated to the workman by the employer by the Telegram dated 11-5-1999. That inspite of receipt of the said Telegram, the workman failed to resume for his duties as required and did not report for duties from 8-5-1999 onwards or at any time thereafter till 6-7-1999, when his services were terminated vide letter dated 2-7-1999 as per the terms of Clause (6) of the letter of confirmation dated 1-1-1989. That the said letter was sent to the workman by Regd. Post with A/D, along with the said letter, the workman was also sent all his legal dues amounting to Rs. 39,504/- under Cheque No. 0862321 dated 1-7-1999 drawn on Goa Urban Co-operative Bank Ltd., Panaji, Goa, consisting of Notice Pay, Retrenchment Compensation and other dues. It is the case of the employer that as per the terms of Clause (6) of the letter of confirmation dated 1-1-1989, the services of the workman automatically came to an end on account of his continued absence from 8-5-1999 onwards; and the employer under their letter dated 2-7-1999 gave effect to the said automatic termination with effect from 6-7-1999 on payment of Rs. 39,504/- Cheque No. 0862321 dated 1-7-1999 drawn on Goa Ubran Co-operative Bank Ltd., Panaji, Goa, consisting of Notice Pay, Retrenchment Compensation and other dues as aforesaid.

That the termination of the services of the workman as aforesaid constitutes 'Retrenchment' within the meaning of Sec. 2(oo) of the Industries Dispute Act, 1947 and since the provisions of Sec. 25-F having been fully complied with by the employer, the same is perfectly legal and justified. The employer denied that the workman was sick in the first week of May, 1999 and that he sent a telegram for extension of leave. The employer denied that the employer met Mr. Kulkarni and informed Mr. Kulkarni about his sickness. The workman filed his rejoining at Exb. 6.

4. Based on the pleadings the following issues were framed at Exb. 7.

1. Whether the Party I proves that the action of the Party II in terminating his services with effect from 6-7-1999 is illegal and unjustified ?
2. Whether the Party II proves that the Party I is self employed ?
3. Whether the Party I is entitled to any relief ?
4. What Award ?
5. My findings on the above issues are as under:

1. Issue No. 1: In affirmative.
2. Issue No. 2: In the negative.
3. Issue No. 3: As per para 15 below.
4. Issue No. 4: As per order below.

REASONS

6. *Issue No. 1, 2, 3 and 4:* All these issues are taken up together as all are interlinked to each other. Adv.

Shri C. J. Mane appeared for the workman and submitted that the workman was employed with the employer with effect from 26-10-1987 as a 'Trainee Clerk' and was confirmed in the services by letter dated 1-1-1989. That the workman was promoted to the post of 'Senior Clerk' by letter dated 5-5-1994 and after six months the workman was working as a Room Service Incharge. That he applied for leave from 8-4-1999 to 7-5-1999 and the same was sanctioned to him by the workman. That he fell sick during the first week of May, 1999 and he sent a telegram on 8-5-1999 to the employer seeking extension of his leave. That the extension of leave was refused to the workman by the employer and same was informed to the workman by the telegram, received by the workman on 12-5-1999, on the ground of exigencies of work. That after few days the workman met Mr. Kulkarni, the then Restaurant Manager of the employer and informed him that he was suffering from back-ache and pain in the spinal cord and he was unable to report for duty immediately. That the said Mr. Kulkarni informed the workman to resume for work after recovering from the sickness with a medical certificate. That the workman recovered fully and reported for duty on 29-6-1999. That on 29-6-1999 when he reported for work he found that his attendance card was removed from the rack and was not permitted to resume for his duty. That he immediately met Mr. Kulkarni, the Restaurant Manager who in turn asked him to meet the Personal Manager. That when he went to meet the Personal Manager, the said Personal Manager informed the workman that he was busy and told him to come on the next day. That when the workman went to the next day the Personal Manager did not meet the workman and was told that he would be sent communication for resuming duties subsequently. That on 2-7-1999 he received a letter from the workman stating that as per Clause (6) of the confirmation letter dated 1-1-1989 his services automatically came to an end with effect from 6-7-1999 on account of his continued absence from 8-5-1999. That along with the said letter the employer enclosed a cheque of Rs. 39,504 towards notice pay and compensation. Adv. Shri Mane Contended that order of termination dated 2-7-1999 terminating the services of the workman with effect from 6-7-1999 is illegal and unjustified and bad in law and prayed for reinstatement of the work with full back wages and continuity in service. He further contended that the workman never remained continuously absent but was unable to report for work on account of his ill health. He contended that the termination of the services of the workman has been done by violating the principles of natural justice and by not affording any reasonable opportunity to the workman and that the dues sent along with order of termination were acceptable by the workman under protest. He contended that no inquiry or charge sheet was issued to the workman prior to the termination, no opportunity of being heard was given to the workman. The termination is thus abruptly illegal. In support of his contention, he relied on the judgments of Rajasthan High Court between J. K. Goyal V/s Jaipur Metals and Electricals Limited reported 1997 2LLJ page 1075, judgment of Karnataka High Court between Rajendra Bhatt V/s Chairman, Andra Bank, Hyderabad and others reported in 1997 3LLJ (spp) page 277, judgment of Supreme Court of Shri Nar Singh Pal V/s Union of India and others reported in 2000 1LLJ page 1388 and Supreme Court judgment between Uptron India Limited V/s Shammi Bhan and another reported in 1998 1LLJ page 1165.

7. Ld. Adv. G. B. Kamat appearing for the employer contended that the termination of services of workman was done as per the terms of letters of confirmation dated 1-1-1989 by invoking Clause 6 of the said letter of confirmation. He contended that the termination amounts to retrenchment and the employer has paid retrenchment compensation as per the provisions of Section 25(f) of the Industrial Dispute Act, 1947 and hence and having completed requirements of the said section, the termination is perfectly legal. He further contended that the workman was on sanctioned leave from 8-4-1999 to 7-5-1999 and after expiry of the leave period, the workman did not report for work but continued to remain absent without any intimation; and on 10-5-1999 the workman sent a telegram, asking for extension of leave, on account of personal work. The employer refused extension of leave to workman on account of exigencies of work and requested him to resume for work immediately and the same was communicated to the workman by telegram dated 11-5-1999. He submitted that the workman failed to resume for duty as required from 8-5-1999 till 6-7-1999 and as per the term of Clause 6 of his letter of confirmation dated 1-1-1989, his services were terminated by paying him notice pay, Retrenchment Compensation and other dues. Adv. Kamat further contended that the termination of the services of workman constitute retrenchment within the meaning of 2(oo) of the Industrial Dispute, 1947 and the since the provisions of Section 25(f) are fully complied with the termination is legal and justified. He relied on the judgment of the Supreme Court reported AIR 1973 page 878 between management of Hindustan Steel v/s the workman; judgment of Rolstan John V/s Central Government Industrial Tribunal-AIR 1994SC page 131; judgment of Supreme Court between State of Haryana V/s Satyender Singh Rathore AIR 2005 SC page 4251.

9. I have carefully considered the arguments advanced by both parties. Both parties have led evidence before this court. The workman has examined himself in his deposition at Exb. 9. The workman has stated that he was employed with the employer as a trainee clerk in October, 1987 and his services were confirmed by the employer vide letter dated 1-1-1989. The said letter is at Exb. W-3. The workman futher stated that he had applied for leave from 8-4-1999 to 7-5-1999 and the same was sanctioned to him. He has admitted that he did not report for duty on the expiry of his leave and applied for extension of leave by a telegram dated 8-5-1999. The said telegram is at Exb. E-1. He further stated that he received a telegram from employer in response, refusing to grant him extension of leave.

The said telegram is at Exb W-6. He stated that after few days he met Mr. Kurkarni, the Restaurant Manager on 14-5-1999 while submitting his leave application to the Food and Breverage Manager, as he was his immediate Supervisor. He stated that he informed Mr. Kulkarni that he was sick and needed extension of leave. He stated that Mr. Kulkarni informed him to resume for work after recovering from his sickness with a medical certificate. He further stated that when he reported for duty on 29-6-1999 he was not allowed to resume for his duty. He further stated that he thereafter met Mr. Kulkarni and was unable to meet Mr. Bhatikar, as he was not there in his office. He further stated that on 2-7-1999 he received a letter from the employer stating that his services have been terminated with effect from 6-7-1999. The said letter is at Exb. W-7. He has stated that no charge-sheet, nor any inquiry was conducted against him, prior to his termination. In the cross examination the workman admitted that in the telegram sent to the employer he had just mentioned that he wanted extension of leave because of his personal work. He admitted that in the said telegram he did not mention anything regarding his sickness. He had also admitted that he has received the cheque of Rs. 39,504/- along with the letter of termination dated 2-7-1999 Exb. W-7. He admitted that he had encashed the said cheque and the same was accepted by him under protest.

8 The employer examined the Personal Manager, Mr. Bhatikar at Exb. 10. In his cross examination in chief the witness has admitted that the workman was appointed as a clerk with the employer and that was confirmed vide letter dated 1-1-1989 which is at Exb. W-3. He has stated that the workman was on sanctioned leave on 8-4-1999 to 7-5-1999 and was supposed to resume on 8-5-1999. He further stated that the workman did not resume for his duties on 8-5-1999 and that on 10-5-1999 the employer received a telegram from the workman asking for extension of leave on "personal ground". The said telegram is at Exb. E-1. The witness stated that as the services of the workman were required due to exigencies of work and extension of leave was refused and the same was communicated to the workman by a telegram which is at Exb. W-6. He has further stated that the workman had remained absent continuously for more than 10 days beyond the period of sanctioned leave and his services came to an end as per Clause 6 of confirmation letter Exb. W-3. He has also stated that along with the letter of termination dated 2-7-1999 the workman was paid an amount of Rs. 39,504/- towards compensation and other legal dues. In the cross examination, the said witness denied that the termination is illegal and unjustified.

9. I have gone through the entire pleadings and the documents placed on record by the parties. The entire case of the employer is that the termination of the services of the workman has been done as per Clause 6 of the confirmation letter dated 1-1-1989 Exb. 3. I have gone through the said confirmation letter and Clause 6 of the said letter reads as under: "Your absence for a continuous period of 10 days (including absence when leave though applied for but not sanctioned) or over-stay for a period of ten days, would make you loose your lien on the job and your services shall automatically come to an end without any notice or intimation from the side of the management". The complete reading of this Clause suggest that absence for continuous period of 10 days which includes absence when applied for leave but not sanctioned or overstay, the leave period for 10 days would loose the lien on the job and the services of the workman would automatically come to an end without any notice or intimation from the side of management. It is admitted that the workman was on leave for the period from 8-4-1999 to 7-5-1999, the workman was supposed to resume for duty on 8-5-1999. The workman did not resume for his duty on 8-5-1999, however the workman sought extension of leave on 8-5-1999, the telegram which is at Exb. W-6 on account of personal reasons. The employer refused to grant extension to the workman due to exigencies of work and the same was communicated to the workman by a telegram which was received by the workman on 8-10-1999 which is at Exb. W-6. From the entire evidence discussed above, what is to be seen is to whether the services of the workman who has acquired the status of confirmed empoyee can be terminated in the mode and manner done by the employer who states that the said termination was done in accordance with Clause 6 of the appointment order dated 1-1-1989 and no grievance can be raised by the workman regarding his termination order.

10. The Clause (6) of the said appointment order reads as under. "Your absence for a continuous period of 10 days (including absence when leave though applied for but not sanctioned) of over-stay for a period of ten days, would make you loose your lien on the job and your services shall automatically come to an end without any notice or intimation from the side of the management". It was in provisions of the above clause, the employer terminated the services of the workman. It is admitted by the employer that the workman was a permanent empoyee. The confirmation of permanent status on an employee guarantees security of tenure to the employee. It is well settled now that the services of a permanent employee whether employed by the Government of Government Company or Government Institution or any other authority cannot be terminated abruptly or arbitrarily either by giving him a months notice or pay in lieu thereof or even without notice, not withstanding that there may be stipulation to that effect though in the contract of service or in the Certified Standing Orders.

11. The Supreme Court in the case of West Bengal State Electricity Board and others V/s Desh Bhandu Ghosh and other 1985 1LLJ page 373 has held that any provisions in the regulations enabling the management to terminate the services of pemanent employee by giving three months' notice or pay in lieu thereof, would be bad as violative of Article 14 of the Constitution. Such a regulation was held to be capable of vicious discretion and also held to be 'naked hire and fire' rule.

These principles were again reiterated by the Supreme Court in the case of O. P. Bhandari V/s Indian Tourism Development Corporation Ltd., and others 1986 2 LLJ page 509 wherein the Supreme Court held that rule 31 (v) of the Indian Tourism Development Corporation conduct disciple and appeal rules, 1998 which provided that the services of the permanent employee can be terminated by giving him 90 days notice or in paying lieu thereof would be violative of article 14 and 16 of the Constitution. This being the legal position, the action of the employer in putting an end to the services of the workman by invoking Clause 6 of the appointment letter by way of automatic termination of service is wholly illegal.

In the case of D. K. Yadav V/s J. M. A. Industrial Ltd., 1993 2LLJ page 696, the Supreme Court has laid down that the cardinal point that has been borne in mind in every case is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and liberally. It is not so much to act judicially but to act fairly and the procedure adopted must be just, fair and reasonable in the circumstances of each case. In other words, the application of the principles of natural justice that no person should be condemned, inherent intends to prevent the authority to act arbitrarily affect the rights of the concerned person. It is the fundamental rule of law that no decision must be taken which will affect the right of any person who have been of the case and affording an opportunity to put forward his case. This procedure prescribe for depriving the livelihood of the person must be right, just and fair and not arbitrary and oppressive.

12. Ld. Adv. Shri Mane appearing for the workman relied upon the judgment of Uptron India Ltd.(Supra). In this case the Supreme Court in para 25 of its judgment has held that Clause 6 of the Certified Standing Orders providing for automatic termination of permanent employee not directly related to production in the factory or any industrial establishment would be bad if it does not provide an opportunity of hearing to the employee whose services are treated to have come to an end automatically. In the present case, the employer has terminated the services of the workman by invoking Clause 6 of the appointment order. Admittedly, this clause does not provide for any opportunity of hearing to the employee whose services are treated to have come to an end automatically being so, this clause is bad and illegal. In this case, admittedly, no opportunity was given to the workman prior to putting an end to the services of the workman by invoking Clause 6 of its appointment order, it would have been a different case, had the employer provided an opportunity of being heard to the workman prior to invoking Clause 6 of the appointment letter, then in that circumstances the workman would have explained the circumstances which compelled him to overstay sanctioned leave. The employer did not conduct any inquiry nor gave any opportunity to put forward his case. Though in the present case the workman has not brought on record any documents to show that overstaying of sanctioned leave was on account of his sikness. No medical certificate has been produced by the workman either before this court or before the employer. The telegram which was sent by the workman to the employer requesting for extension of leave mentioned the reason as personal work but subsequently the work took a stand that he was sick. Presuming the workman was sick nothing prevented him from bringing on record before this court his medical sickness certificate. No. satisfactory explanation is given by the workman for no producing the same.

Further, in the present case the termination of the services of workman has been done by the employer in according with Clause 6 of the confirmation letter which provides automatic termination of service for remaining absent for 10 consecutive days when applied for leave and not sanctioned or for overstaying for a period of 10 days without initimation. The principles laid down in the case of Uptron India Ltd., (Supra) are squarely applicable to the present case as in para 25 the Hon'ble Supreme Court has held that the Clause 17(g) was not ultra-virus, but it held that the action taken against the respondent to whom an opportunity of hearing was not given was bad. The Supreme Court did not say that the termination in accordance with the clause of standing order is bad but it confirmed the findings of the High Court, that the termination without providing an opportunity of being heard was bad. Para 25 of the said judgment, the Supreme Court observed that

> "In view of the above we are of the positive attitude that in Clause of the Certified Standing Orders providing for automatic termination of service of a permanent employee but not directly related to production or industrial establishment would be bad, if it does not provide any opportunity of hearing to the employee whose services are treated to have come to an end automatically".

From the above it is clear that the termination of the services in view of any clause in the Certified Standing Orders or in the appointment letter, which provide for automatic termination of service of a permanent employee, not directly related to production in a factory or establishment would be bad, if it does not provide any opportunity of hearing to an employee whose services are treated to have come to an end.

In the present case no opportunity of hearing was afforded to the workman prior to the termination of the services for over staying sanctioned leave for more than 10 days, in view of Clause 6 of the appointment letter. In view of the observations, made by the Supreme Court in the case of Uptron India Ltd., (Supra) West Bengal State Electricity Board (Supra), O. P. Bhandari (Supra)., I am of the view that terminating the services of the workman invoking Clause 6 of the appointment letter dated 1-1-1989 without giving any opportunity to the workman to put forward his case is bad.

13. The next contention raised by Adv. Shri G. B. Kamat is that the termination of the services of the

workman in accordance with any Clause of appointment order which provides for automatic termination of services for remaining absent for 10 consecutive days when applied for leave and not sanctioned or for overstaying for a period of 10 days without intimation would constitute retrenchment.

We may now consider the definition of "Retrenchment" which is defined in Section 2(oo) as under:-

> 2(oo) "Retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include;
>
> (a) voluntary retirement of the workman; or
>
> (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or
>
> (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or
>
> (c) termination of the service of a workman on the ground of continued ill-health"

The defination of "Retrenchment was introduced in the Act 43 of 1953 with effect from 24th of October, 1953. Clause (bb) was inserted in the definition by Act, 49 of 1984 with effect from 18-8-1984.

The definition is conclusive in the sense that "Retrenchment" has been defined to mean the termination of the service of a workman by the employer for any reason whatsoever. If the termination was by way of punishment as a consequence of disciplinary action, it would not amount to "Retrenchment". Originally, there were two other exceptions, namely.

a. voluntary retirement of the workman, and

b. retirement of the workman on reaching the age of superannuation if the contract of employment contained a stipulation to that effect.

By the Amending Act 49 of the 1984, two further exceptions were introduced in the definition by inserting Clause (bb) with effect from 18-8-94; one was the termination of service on the ground of continued ill-health of the workman and the other was termination of service on account of non-renewal of the contract of employment on the expiry of the term of that contract. If such contract of employment contained a stipulation for termination of service and the services of the workman are terminated in accordance with that stipulation, such termination, according to Clause (bb), would also not amount to "Retrenchment".

14. The employer in the present case has contended that at the time of his termination of the services of the workman, the employer had paid the workman retrenchment compensation as per Section 25(f) of the Industrial Dispute Act and this being the case the workman is not entitled for any relief. Ld. Adv. Shri Mane appearing for the workman has relied on the judgment of Uptron India Ltd., (Supra). In this judgment, the Supreme Court has also held that the termination of services of workman amounts to retrenchment. The findings of the Tribunal and the High Court to the extend that the termination was a retrenchment was not disturbed by the Hon. Supreme Court. The Supreme Court also observed that the said case does not fall in any of the other exceptions of Section 2(oo), therefore, the case is of retrenchment. In this case, the Supreme Court has held that since the case falls within the meaning of 2(oo), the compliance of Section 25(f) of Clause a & b is mandatory.

Similarly, in the case of Rolston John (Supra) the Supreme Court held that it is the case of retrenchment and having not complied with the mandatory provisions of Clause (a) and (b) of Section 25(f), the termination was void and ineffective.

Similar observation was made by the Supreme Court in the case of Delhi Cloth and General Mills Ltd., V/s shambhunath Mukerji AIR 1978 page 8. In this case in para 14 of the judgments the Supreme Court observed that striking out the name of the workman from the rolls of the management is the termination of his services. Such termination of service is retrenchment within the meaning of 2(oo) of the act. There is nothing to show that the provisions of Section 25(f) a & b were complied with by the management in this case. The compliance of provisions of Section 25(f) are mandatory and the order of termination in violation of these two preemptory conditions precedent, is invalid. I have already held above that the case of the workman does not fall in any of the exceptions laid down in Section 2(oo) of the Industrial Dispute Act, 1947. The Supreme Court in the case of Santosh Gupta V/s State Bank of Patiala 1980 2LLJ page 72 has held that every type of termination of service of the workman except those specifically excepted amounts to retrenchment. I therefore hold that the present case of termination of services of the workman, amounts to retrenchment within the meaning of 2(oo) of the Industrial Dispute Act, 1947.

15. Having held that the present case of termination of the workman is retrenchment, it is to be seen whether the employer has complied with the conditions laid down for valid retrenchment. As referred above Section 25(f) of the Industrial Dispute Act, 1947 prescribes the procedure for retrenching the services of workman. It lays down that the services of the workman who is in continuous service for not less than one year cannot be retrenched unless he has been given one month's notice or paid wages in lieu of one month's notice and he has been paid compensation at the rate of 15 days

average wages, each for every completed year of service or any part thereof in excess of six months. Sec. 25 B of the Industrial Dispute Act, 1947 defines "Continuous Service". It state that a person shall be deemed to be in continuous service under an employer for a period of one year. If the workman during the period of 12 calendar months preceding the date with reference to which calculation is to be made has actually worked under the employer for not less than 190 days in the case of a workman employed below ground in a mine and 240 days in any other case.

In the present case the workman was a comfirmed employee of the employer whose services were terminated by letter dated 2-7-1999 by invoking Clause 6 of the appointment letter dated 1-1-89. The Supreme Court in the case of M/s. Avon Services Production Agency Pvt. Ltd., V/s Industrial Tribunal, Hariyana and others reported in AIR 1970 SC 170 has held that giving notice and payment of compensation is a condition precedent in the case of retrenchment and failure to comply with the prescribed conditions precedent for valid retrenchment is Sec. 25F renders the order of retrenchment invalid and inoperative. Same principles are laid down by the Supreme Court in the case of Gammon India Ltd., V/s Niranjan Das reported in (1984) I SCC 509. In the present case, the employer in his written statement at para (8) and (9) has specifically stated that at the time of the services of the workman, the employer paid the workman notice pay, retrenchment compensation and other dues amounting to Rs. 39,504/- by a cheque No. 0862321 dated 1-7-1999 drawn on Goa Urban Co-operative Bank, Panaji and having complied with the provisions of 25(f) the termination of the services is perfectly legal and justified. These pleadings are confirmed by the workman as well as witness of the employer Mr. Bhatikar. The workman has only said that he has accepted the amount sent to him towards compensation "under protest". The workman has not challenged or disputed the amount of retrenchment sent to him by the employer either in his rejoinder or in the evidence led before this court. No dispute or challenge is thrown to the quantum of retrenchment compensation paid to the workman by the employer. On the contrary there is an admission that the amount sent towards notice pay, retrenchment compensation and other dues has been accepted by the workman under protest. The only ground taken by the workman is that the termination of his services is illegal and unjustified. This issue has already been decided by the above. Even when the clarification was sought by the court from the workman on the judgment of Uptron India Ltd., (Supra) holding the termination as retrenchment, no satisfactory explanation was given by the workman.

In the facts of the given case I am of the view that the termination of the services of the workman amounts to retrenchment within the meaning of 2(oo) of the Industrial Dispute Act, 1947 and the employer has fully complied with the mandatory provisions of Section 25(f) Clause a & b, prior to the termination of the services of the workman. This being the case I hold that the workman has failed to prove that the termination of his services with effect from 6-7-1999 is illegal and unjustified. I further hold that the workman/ /Party I is not entitled for any relief.

Hence I pass the following order.

ORDER

It is hereby held that the action of the management of M/s. Hotel Mandovi, in terminating the services of Shri Rishikesh Gauthankar, Clerk, with effect from 6-7-1999 is legal and justified.

No order as to cost.

Inform the Government accordingly.

Sd/-
(Suhas Naik),
Presiding Officer,
Labour Court–II.

Notification

No. 28/6/2005-LAB/506

The following Award passed by the Industrial Tribunal of Goa, at Panaji-Goa on 19-7-2006 in reference No. IT/24/2001 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Hanumant T. Toraskar, Under Secretary (Labour).

Porvorim, 3rd August, 2006.

IN THE LABOUR COURT – II
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Suhas Naik, Hon'ble Presiding Officer)

Ref. No. IT/24/2001

Miss Sima M. Shirsikar,
Ascanio D'Costa Road,
House No. 103,
Behind Grace Church,
Margao-Goa. ... Workman/Party I

V/s

M/s. Govind Poy Oxygen Ltd.,
Post Box No. 23,
Margao-Goa. ... Employer/Party II

Workman/Party I – Represented by Adv. Shri V. P. Halarnkar.

Employer/Party II – Represented by Adv. Shri B. G. Kamat.

Panaji, dated: 19-7-2006.

AWARD

The Government of Goa by order dated 14th May, 2001 bearing No. IRM/CON/SG/(6)/2001/2077 referred the following dispute for adjudication:

"Whether the action of the management of M/s. Govind Poy Oxygen Limited, Margao-Goa, in terminating the services of Miss Sima M. Shirsikar, Clerk, with effect from 1-1-2001, is legal and justified ?

If not, to what relief the workman is entitled ?"

2. On receipt of the reference a case was registered under No. IT/24/2001 and registered A/D notices were issued to the parties. In pursuance to the said notice, the parties put in their appearance. The Workman-Party I (for short, "Workman") filed the statement of claim at Exb. 3. The case of the workman in brief as pleaded in the statement of claim is that the workman was employed with the Employer-Party II (for short, "Employer") in the capacity of a clerk w.e.f. 1-9-94 by an appointment letter dated 31-8-94 and since then the workman was performing the work diligently and faithfully without any adverse remark. That the employer on 2-1-2001 issued a letter dated 28-10-2000 to the workman informing the workman that her services stands terminated w.e.f. 1-1-2001. That the said letter of termination is bad in law and is illegal as the said letter was served on the workman on 2-1-2001 terminating her services w.e.f. 1-1-2001. That the termination of the services of the workman is on account of being found surplus in her category. It is the case of the workman that the termination of her services has been done in violation of the provisions of Sec. 25F of the Industrial Disputes Act, 1947. The workman has stated that the employer has not shown any justification for terminating her services. That the employer has recruited new workmen in their own company and also in its other sister concerns after her termination of service. That the termination of her services amounts to unfair labour practice. That the employer has not made out any case for terminating her services. That the principles of "first come last go" has not been followed by the employer at the time of her termination of service. The workman prayed for reinstatement with full back wages and continuity in service.

3. The employer filed written statement at Exb. 5. In the written statement the employer stated that it is a public limited company engaged in the business of manufacturing and supply of oxygen and other industrial gases having its factory at Arlem, Raia, Salcete-Goa. It is the case of the employer that the employer had appointed the workman vide appointment letter dated 31-8-1994 as a Clerk, w.e.f. 1-9-1994 on certain terms and conditions mentioned in the said appointment letter and the workman continued to work with the employer till 31-12-2000. That clause (6) of the said appointment letter reads that, in case of retrenchment, the services of the workman can be terminated irrespective of her seniority or juniority in the category. The employer further stated that the workman was attending the work of maintenance of cylinder records at Margao office manually along with other clerks and typists till August, 2000. After August, 2000 the said work was partially computerised at the factory establishment and thereafter the workman started attending the said work at the factory establishment when the total computerisation was complete in or about December, 2000. That on account of total computerisation of the work of maintenance of cylinders record at the employer's factory, for the purpose of economy and convenience the employer decided to reorganise the said work and after re-distribution/re-organisation of the said work, the services of 2 employees in the category of clerk were found surplus and therefore the employer decided to terminate the services of the 2 employees in the said category. That vide letter dated 28-12-2000 the employer terminated the services of the workman w.e.f. 1-1-2001. That this letter of termination was served on the workman on 29-12-2000 by one Smt. Sudha Bhat, Accounts Officer of the employer along with the final settlement of dues, consisting of notice pay, retrenchment compensation, wages till 31-12-2000 and other legal dues amounting to Rs. 39,373.25 by a crossed cheque dated 27-12-2000 drawn on the Mapusa Urban Co-operative Bank of Goa Ltd. That upon serving the above said cheque and the letter on the workman, the workman returned the same after reading the said letter stating that she would collect the said letter after taking legal advise in the matter and subsequently collected the said letter of termination and cheque on 2-1-2001 under protest. The employer denied that the letter of termination is in violation of the provisions of Sec. 25F of the Industrial Disputes Act, 1947. The employer also denied that they did not comply with the procedure of 'last come first go' before terminating the services of the workman. The employer denied that they have recruited any view workers as clerks after the termination of the workman. The employer stated that the workman is gainfully employed from the date of her termination and that she is not entitled for any reliefs. The workman filed rejoinder at Exb. 6.

4. On the pleadings of the parties, following issues were framed at Exb. 7.

1. Whether the Party I proves that termination of her service by the Party II w.e.f. 1-1-2001 is in violation of the provisions of Sec. 25F and 25G of the Industrial Disputes Act, 1947 ?
2. Whether the Party I proves that the action of the Party II in terminating her services w.e.f. 1-1-2001 is illegal and unjustified ?
3. Whether the Party I is entitled to any relief ?
4. What Award?

5. My findings on the above issues are as follows:

Issues No. 1: In the negative.

Issues No. 2: In the negative.

Issues No. 3: As per para. 19 below.

Issues No. 4: As per order below.

REASONS

6. *Issue No. 1 & 2:* Both these issues are taken up together because they are interlinked to each other. Ld. Adv. Shri V. P. Halarnkar appearing for the workman submitted that the workman was employed with the employer in the capacity of a Clerk w.e.f., 1-9-94 vide appointment letter dated 31-8-94 and that since her appointment the workman was working with the employer diligently and faithfully with clean and unblemished service records. He contended that on 2-1-2001 the workman was served a letter of termination which is dated 28-12-2000, stating that on account of being found surplus in her category in the present set up of the working of the employer, the employer does not require the services of the workman. He further contended that the said letter of termination is totally in violation of the provisions of Sec. 25F of the Industrial Disputes Act, 1947 as the employer did not comply with the mandatory provisions prior to termination of services of the workman. He submitted that the employer has not given any justification for terminating the services of the workman. He submitted that the workman was on leave from 26-12-2000 till 31-12-2000 and on 2nd January, 2001, the workman was called by the employer and when the workman reported for work on 2-1-2001 the employer handed over a letter dated 28-12-2000 along with the statement of account to the workman stating that on being found surplus in her category in the present set up of working of the employer the employer does not require the services of the workman. He submitted that the workman had accepted the said letter under protest. He submitted that after terminating the services of workman the employer has recruited new workers in place of workman. He submitted that the employer has also not complied with the Sec. 25F and 25G of the Industrial Disputes Act, 1947 and that termination of her services is illegal, bad in law and unjustified. In support of his contention he relied on the judgment reported of Supreme Court in the case of Delhi Transport Corporation v/s D.T.C. Mazdoor Congress and others reported in 1991 Sc page 101; and Uptron India Ltd., v/s Shammi Bhan and another reported in AIR 1998 SC page 1618.

7. Ld. Adv. G. B. Kamat appearing for the employer submitted that the employer is a public limited company and is engaged in the business of manufacturing and supply of oxygen and other industrial gases having its factory at Arlem, Raia, Salcete-Goa. He submitted that the employer had appointed the workman vide appointment letter dated 31-8-1994 as a Clerk w.e.f. 1-9-1994 on certain terms and conditions mentioned in the said appointment letter and the workman continued to work with the employer till 31-12-2000. He contended that the services of the workman were terminated inaccordance with clause (6) of the appointment letter dated 31-8-94 issued to the workman by the employer. He further submitted that on account of total computerisation of work of maintenance of cylinder records at the employer's factory, the employer for the purpose of economy and convenience decided to reorganise the said work and after redistribution/ /reorganisation of the said work, the employer found two workmen surplus in the category of clerk and accordingly terminated the services of workman vide letter dated 28-12-2000 by way of retrenchment w.e.f. 1-1-2001. He submitted that at the time of the retrenchment of the services of the workman, the workman was paid notice pay, retrenchment compensation, wages till 31-12-2000 and other dues amounting to Rs. 39,373.25 by a crossed cheque dated 27-12-2000 drawn on the Mapusa Urban Co-operative Bank of Goa Ltd. Adv. G. B. Kamat further submitted that the said letter was served on the workman along with the statement of account and the cheque and the workman collected it on 2-1-2001 under protest. He submitted that the termination has been done inaccordance with provisions of the Industrial Disputes Act, 1947 and that the employer has not violated any provisions of the Act. He contended that the termination of the services of workman by way of retrenchment is justified and legal. In support of his contention he relied on the decision of Supreme Court in the case of Bombay Union of Journalist & others v/s The State of Bombay and another reported in AIR 1964 SC page 1617; the judgment reported in FLR 2003 page 110 between Pramod Jha and others v/s State of Bihar and others; the judgment reported in FLR 2001, page 778 between Ram Gopal Saini v/s The Judge, Labour Court No. 2, Jaipur and others; and the judgment reported in 1999 F.J.R.(94) page 14 between New Haven Steel Ball Corporation Pvt. Ltd., v/s Ramnarayan Kera Yadav and another.

8. During the course of arguments, Adv. G. B. Kamat submitted that no notice of retrenchment is required to be served on the appropriate Government though Sec. 25F sub-clause "c" states that notice in the prescribed manner has to be served on the appropriate Government or for such authority as may be specified by the appropriate Government by notification in the Official Gazette which is a condition precedent for the retrenchment of a workman. He submitted that clause 'c' of Sec. 25(F) is directory and clause (a) and (b) are mandatory. Hence non compliance of Sec. 25(F) clause (c) does not render retrenchment illegal provided the mandatory clause (a) and (b) of Sec. 25(F) are complied prior to termination of the services of the workman by way of retrenchment. In support, he relied on the judgment of Supreme Court in the case of Bombay Union of Journalist & others (supra), and the judgment of Pramod Jha and others (supra). He further submitted that the termination of the services of the workman has been done by the employer by way of retrenchment as per the terms of the appointment letter issued to the workman which is dated 28-12-2000. He submitted that the termination of the services of the workman can be done if there is an agreement between the parties to this effect. In support, he relied on the judgment of

Punjab and Haryana High Court reported in Lab. I.C. Page 348. He submitted that in the present case the workman had entered into a contract by signing letter of appointment with the employer wherein in clause (6) it is mentioned that the services could be retrenched/ /terminated irrespective of seniority or juniority in the said category. Hence, the termination of the services of the workman is perfectly legal.

He further submitted that merely mentioning the names of the workmen who were alleged to be recruited in place of the workman will not absolve the workman of its burden in proving that the employer has recruited new workers in place of workman. He submitted that it is for the workman to prove that the employer has recruited new workers after terminating her services. In support of his contention he relied on the judgment of Rajasthan High Court in the case of Ram Gopal Saini (supra).

9. I have carefully considered the arguments advanced by both the parties. Both the parties have led the evidence on the above issues. The workman has examined herself in support of her case. In her statement in chief, the workman has stated that she was employed with the employer as a Clerk from 1-9-94 and that she was confirmed in the services as a clerk w.e.f. 1-9-94. The copy of the appointment letter is produced at Exb. E-1. She stated that she was on leave from 26-12-2000 to 30-12-2000 and since 31-12-2000 was a Sunday, she resumed for duties on 1-1-2001. She stated that on 2-1-2001 she received a phone call from the Head Office of the employer, asking her to report for her duties and when she reported for duties on 2-1-2001, she was handed over a letter dated 28-12-2000, stating that her services stands terminated. She further stated that along with the said letter, the employer enclosed the statement of her final account. The said termination letter dated 28-12-2000 is produced at Exb. W-4 along with the statement of account at Exb. W-5. The workman further stated that she accepted the termination letter under protest. She stated that the ground of termination is not genuine. She stated that after her termination, the employer had recruited new workers namely Anita Naik, Janet D'Cunha, Ida Pereira, Sujal Naik, Medha Joshi and Dilip Naik and that these persons are continued in employment of the employer even in 2000 and they continue to work as clerks. She stated that the termination of her services is illegal and unjustified. In cross examination the workman has stated that as a Clerk she was maintaining the records of the cylinders and they are also doing the work of looking after the sales records and also some other manual work including computer typing etc. She has admitted that the work of maintaining cylinder records were computerised. However, she has denied that on account of the computerisation of work her services were terminated on being found surplus. In the cross examination she has admitted that Ida Pereira, Anita Naik and Janet D'Cunha are the employees of Malbar Oxygen Ltd., and that Medha Joshi is working with Fabrica de Gas Carbonica Pvt. Ltd., The workman has also examined one Pandurang Bhat but no material evidence has been brought on record through this witness.

The employer on the contrary examined one Mrs. Sudha Bhat. In her examination in chief she has stated that she is working with the employer as an Accounts Officer and that she is aware of the facts of the present case. She has produced the Power of Attorney given in her favour by the employer which is at Exb. E-2. She has admitted that the workman was working with the employer as a Clerk and that the workman was maintaining the records of the cylinders. She has stated that the workman was working at the Margao depot and was doing the work manually and on 1-1-2001 her services were terminated being found surplus as the employer had computerised the maintenance of the records of cylinders. She has stated that the computerisation was done at the factory premises in December, 2000. She stated that along with the workman, the services of one more employee by name Navneet Mapari was also terminated on being found surplus on account of computerisation of the records of the cylinders. She has stated that along with the letter of termination the workman was paid all her legal dues. She stated that on 29-12-2000 the workman was called at the office and the said letter was served on her. She stated that after the termination of the services of the workman no new workers are employed at the employer factory. In the cross examination she has stated that the work of Margao depot was not computerised. She stated that the workman was transferred to the factory only in December, 2000 and prior to that the workman was working at Margao depot. In her cross examination she has further admitted that all these 6 employees namely (1) Usha R. S. Matha, (2) Karuna Borkar, (3) Vanitha Nayak, (4) Alburquerque e Quadros, (5) Navneet Mapari and (6) Seema Shirshikar were issued transfer order Exb. E-3 and were asked to work at the factory premises.

10. From the evidence on record it is evident that the workman was employed with the employer as a Clerk w.e.f. 1-9-94 and she was a confirmed employee of the employer. That the workman had proceeded on sanctioned leave from 26-12-2000 to 30-12-2000. that as a Clerk she was doing the work of maintaining the records of the cylinders. That she was working at the Margao depot of the employer and her services were transferred along with other employees to the factory of the employer. It has also come on record that prior to the transfer, the workman was working at the Margao depot along with five other workmen. The said transfer order Exb. E-3 states that 6 workmen namely (1) Usha R. S. Matha, (2) Karuna Borkar, (3) Vanitha Nayak, (4) Alburquerque e Quadros, (5) Navneet Mapari and (6) Seema Shirshikar i.e., the workman himself will report to the factory Manager. Further the said order reads that from 21-8-2000 only three employees will report first and rest after further orders. The three employees who were told to report were Usha R. S. Matha, Karuna Borkar and Vanitha Nayak. It is the case of the workman that she never reported at the factory in Sept., 2000 but was

told to report only at the factory from Margao depot in December, 2000 in order to terminate her services. The employer on the other hand contended that on account of computerisation done of the maintenance of records of gas cylinders, the services of the workman was found surplus and her services were terminated from 1-1-2001. The workman has contended that the termination of her services is in violation of Sec. 25(F) and 25(G) of the Industrial Disputes Act, 1947. At this stage it is necessary here to take a cursory glance of Sec. 25(F) of the Industrial Disputes Act, 1947.

> *Sec. 25 F:* "No workman employed in any industry who has been in continuous service for not less than one year under the employer shall be retrenched by the employer untill (1) the workman has been given one months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; (2) the workman has been paid at the time of retrenchment, compensation which shall be equivalent of 15 days average wage for every completed year of continuous service or any part thereof in excess of six months and (3) notice in prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.
>
> 2(oo) "Retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include;
>
> (a) voluntary retirement of the workman; or
>
> (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or
>
> (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or
>
> (c) termination of the service of a workman on the ground of continued illhealth".

11. From the entire pleadings and evidence discussed above, this Court has to decide whether the termination of the services of the workman by the employer w.e.f., 1-1-2001 is in violation of Sec. 25(F) and 25(G) of the Industrial Disputes Act, 1947.

It is an admitted position that the services of the workman were terminated by the employer by letter dated 28-12-2000 on account of being found surplus in her category as the employer had computerised the maintenance of records of the cylinders. The workman has contended that the termination is totally in violation of the provisions of Sec. 25(F) of the Industrial Disputes Act, 1947. The workman has contended that the employer did not follow the procedure of retrenchment set out in the Industrial Disputes Act, 1947. The workman has also contended that the termination is an act of unfair labour practice. As discussed above, no workman employed in any industry who has been in continuous service for not less than one year under the employer shall be retrenched by the employer untill the workman has been given one months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; the workman has been paid at the time of retrenchment, compensation which shall be equivalent of 15 days average wage for every completed year of continuous service or any part thereof in excess of six months and notice in prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.

12. In the present case the employer has stated that the services of the workman were terminated as per clause (6) of the appointment letter which empowers the employer to retrench or terminate the services of an employee irrespective of seniority or juniority and that the services of the workman were terminated as the workman was found surplus. At the time of termination the workman was offered along with the termination letter final settlement dues consisting of notice pay, retrenchment compensation, wages till 31-12-2000 amounting to Rs. 39,373.25 by a cheque dated 27-12-2000. The employer has denied that they have violated the provisions of Sec. 25F. The employer has stated that the termination has been done in accordance with the provisions of Sec. 25F. The letter of termination dated 28-12-2000 is at Exb. W-4 and the final settlement of account is at Exb. W-5. The said letter of termination says that on being found surplus in the category of workman in the present set up of working the services of workman stands terminated w.e.f. 1st January, 2001. The workman is paid notice pay, compensation in addition to the wages. The settlement of the account is also on record. The said statement of settlement mentions that the workman has been paid the salary for the period 1-12-2000 to 31-12-2000 wages in lieu of unavailed leave, compensation, pay in lieu of notice and gratuity amounting to Rs. 39,373.25. As per this letter and the statement of account it is admitted position that the workman has been paid notice pay, retrenchment compensation, wages for the unavailed leave and salary including gratuity. Thus the employer has complied with the provisions of Sec. 25F prior to the termination of the service of the workman. The workman has not disputed the retrenchment. The only dispute raised by the workman while advancing the arguments is that the employer never gave the notice in the prescribed manner to the appropriate Government. In this regard the employer stated that Sec. 25 sub-clause

(c) is not mandatory but only a directory. The employer submitted that the compliance of clause (a) and (b) of Sec. 25F is strictly as per the requirement of the provision is mandatory. However, compliance with clause (c) is directory and a substantial compliance would be enough and non compliance of clause (c) of Sec. 25F will not render retrenchment illegal. The employer relied on the judgment of Supreme Court in the case of Pramod Jha v/s State of Bihar (supra). In this case the Supreme Court in para. 9 of its judgment has held that, "compliance with Clause (a) and (b) of Sec. 25F strictly as per the provisions is mandatory. However, compliance with clause (c) is a directory and a substantial compliance would be enough". In view of the above rulings of Supreme Court, I am of the view that non compliance of clause (c) of Sec. 25F will not render retrenchment illegal as clause (c) is not mandatory but only a directory whereas compliance with clause (a) and (b) of the Sec. 25F is strictly mandatory. In the present case the employer has fully complied with the provisions of Sec. 25F clause (a) and (b). Being so, the retrenchment cannot be said to be illegal.

13. The next contention raised by the workman is that the employer has flouted the provisions of Sec. 25(G) of the Industrial Disputes Act, 1947, at the time of her termination of services. Sec. 25(G) prescribes the procedure for retrenchment. During the course of the arguments Adv. G. B. Kamat submitted that as per the clause (6) of the appointment letter, there was an agreement of contract between the employer and the workman, wherein the workman had agreed that in case of retrenchment of her services, her services can be terminated by the employer irrespective of seniority or juniority in the said category. He submitted that in view of this clause the employer can terminate the services of the workman by way of retrenchment even without following the principle of "last come first go". He submitted that though none of the junior employees are retained by the employer in the said category, this clause empowers the employer to terminate the services of the workman by way of retrenchment even without following the said procedure laid down in Sec. 25(G) of the Industrial Disputes Act, 1947.

> *25G. Procedure for retrenchment*– Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman.

The plain reading of Sec. 25G makes it clear that when any workman in industrial establishment who is a citizen of India is to be retrenched and he belongs to a particular category of workmen in that establishment, in absence of any agreement between the employer and the workman in this behalf the employer shall ordinarily retrench the workman who was the last person to be employed in that category, for reasons to be recorded by the employer any other workman. It is the case of the workman that at the time of terminating the services of the workman, the employer retained the junior workmen and did not follow the principle of "last come first go". The workman has also stated the names of such junior workmen who are retained in the services by the employer. The employer on the contrary has denied that any junior staff has been retained by the employer at the time of the termination of services of the workman. According to the employer following workmen namely Medha Joshi, Anita Naik, Janet D'Cunha and Ida Pereira were the staff of its sister concern and the same has been confirmed by the workman herself during her cross examination at page 4, wherein she admitted that Ida Pereira, Anita Naik and Janet D'Cunha were the employees of Malbar Oxygen Ltd., and Medha Joshi was the employee of Fabrica de Gas Carbonica Pvt. Ltd. Further, according to the employer, the other workmen namely Usha Matha, Karuna Borkar, Vaneeta Naik and G.P.D.S. Albuquerque are the seniormost employees employed prior to employment of workman with the employer. This has been confirmed by the witness of the employer Mrs. Bhat in her cross examination. It was the duty of the workman to bring on record the substantial evidence to show that after the termination of her services the employer retained the junior staff without following the provisions of Sec. 25(G). No such evidence or relevant documents has been brought on record by the workman. It was always open for the workman to call for the records of employment from the employer. No such effort has been made. It is well settled that it is for the party who makes the allegation against the other party has to prove such allegations against the other party. The obligation to lead evidence to establish an allegation made by party, is on the party making the allegation, the test being that he who does not lead evidence must fail. I am supported in my view by the judgment of V.N.S. Engineering Services Co. v/s Industrial Tribunal, Goa, Daman and Diu, reported in FJR(71) page 393. Thus the onus of proving this issue was on the workman. Merely mentioning the names of the persons does not serve the purpose. The Rajasthan High Court in the case of Ram Gopal Saini Judge Labour Court and others (supra) has held that the duty is cast upon the appellant to prove that the respondent has violated the provisions of Sec. 25(H) and Sec. 25(G) by way of documentary evidence before the Labour Court. Mere mentioning the names of the junior persons who were alleged to be appointed after retrenchment of the appellant would not serve the purpose. In the present case, except for mentioning the names the workmen has not produced any documentary evidence to show that the employer has retained junior employees on their rolls at the time of termination of services of the workman. The names which are mentioned by the workman also does not belong to the Party II/employer. Few names mentioned above are of the employees of other companies, namely Malbar Oxygen Ltd., and of Fabrica de Gas Carbonica

Pvt. Ltd. and this fact has been admitted by workman herself in her cross examination. Thus in the absence of concrete proof and documentary evidence, I am of the view that the workman has failed to prove that after the termination of her services, the employer has retained the junior staff in her category in the establishment of the employer.

14. It is clear from the language of this Section that the principle of "last come first go" is to be complied in absence of any agreement between the employer and the workman. In the present case the employer had issued a letter of appointment to the workman which is at Exb. W-1. The said letter of appointment is the contract of employment signed and agreed between the parties. The clause (6) of this letter of appointment reads as under:

> Clause 6. "In case of retrenchment, your services can be terminated irrespective of your seniority or juniority in the category."

A plain reading of this clause makes it clear that the workman had agreed to the clause 6 by accepting the offer of appointment issued to her at the time of her appointment with the employer and as per this clause of the appointment letter, the services of the workman can be retrenched by way of termination irrespective of seniority or juniority in the said category. In view of the provisions of Sec. 25G itself, since there is a contract between the employer and the workman to the contrary, her services could be terminated by the employer by way of retrenchment. I am supported in my view by the judgment of Punjab and Haryana High Court reported in 1976 Lab. I.C, page 348, in the case of Kashmira Singh v/s The Haryana State Electricity Board and others, wherein it is held that in the case of the petitioners there was a contract to the contrary, that is, their services could be terminated by giving them one month's notice irrespective of their seniority. They were not governed by the principle laid down in Sec. 25G.

15. The workman has relied on the judgment of Supreme Court in the case of Delhi Transport Corporation v/s D.T.C. Mazdoor Congress (supra) and another judgment of Supreme Court in the case of Uptron India Ltd., (supra). I have gone through these judgments. In the case of Delhi Transport Corporation (supra) the Supreme Court held that the services of a permanent employee cannot be terminated abruptly and arbitrarily by giving a simple notice. Similarly, in the case of Uptron India Ltd., (supra) the Supreme Court has held that the services of a permanent employee liable for automatic termination of services on account of overstaying of leave period as per clause 17(9) of Standing Orders amounts to retrenchment and provisions of Sec. 25(F) of the Industrial Disputes Act, 1947 would apply. In the present case it is not the case of termination on account of overstaying of leave period as per the clause of Standing order but it is the case of retrenchment on account of re-organising its business. Hence the above judgments are not applicable to the facts of this case. The facts of this case are totally different from the facts involved in the above cases and as such I am of the view that the workman has failed to prove that the termination of her services by the employer w.e.f., 1-1-2001 is in violation of Sec. 25(F) and Sec. 25(G) of the Industrial Disputes Act, 1947.

16. The next contention raised by the workman is that the termination by way of retrenchment amounts to unfair labour practice. In the entire pleadings as well as in the evidence, the workman has not made out any case of unfair labour practice meted out to her by the employer. A mere allegation without specific pleadings and specific incident, the plea of unfair labour practice cannot sustain. No specific incident of unfair labour practice has been brought on record by the workman. As such, in my view the workman has failed to make out a case that the termination of the services by the employer is by way of unfair labour practice. On the contrary the employer has made out a case that on account of computerisation done by the employer, of maintaining records of its factory for the purpose of economy and convenience, they re-organised the entire work thereby finding two employees surplus and the services of the workman were terminated by way of retrenchment by following the due process of law as provided under Sec. 25F of the Industrial Disputes Act, 1947. The employer has not disputed the fact of computerisation or re-organisation done by the employer in its factory. The only stand taken by the workman is that the ground for termination is illegal whereas the employer has brought on record the evidence to show that the employer re-organised the work of maintenance of records by computerising the total work inorder to re-structure the employer. The employer has also examined the witness Mrs. Sudha Bhat who in her statement has admitted that the employer computerised the maintenance of entire records of gas cylinders and that on account of this the two employees were found surplus.

17. At this stage, it is necessary to decide whether an employer can re-organise his business or arrange his business in a manner he considers best. The Ld. Adv. Kamat submitted that the discretion to arrange the business in the manner the employer considers best is with the employer so long as such re-organisation is done with bonafide intention. The Supreme Court in the case of D. Macropollo & Co.(Pvt.) Ltd., v/s D. Macropollo & Co. (Private) Ltd., Employees Union and others reported in 1958 AIR page 1012 has held that:

> "If the re-organised scheme has been adopted by the employer for reasons of economy and convenience and it has been introduced in all the areas of its business, the fact that its implementation would lead to the discharge of some of the employees would have no material bearing on the question as to whether the re-organisation has been adopted by him bonafide or not. Their discharge and retrenchment would have to be considered as an inevitable, though

very unfortunate, consequence of the re-organised scheme which the employer, acting bonafide, was entitled to adopt".

Similarly in the case of M/s. Parry and Co., Ltd., v/s P. C. Pal, Judge of the Second Industrial Tribunal, reported in AIR 1970 SC page 1334. It is held that:

" A person must be considered free to so arrange his business that he avoids a regulatory law and its penal consequences which he has, without the arrangement, no proper means of obeying. IR 1968 SC 503, Ref.

It is within the managerial discretion of an employer to organize and arrange his business in the manner he considers best. So long as that is done bonafide it is not competent for a tribunal to question its propriety. If a scheme for such reorganization results in surplusage of employees no employer is expected to carry the burden of such economic dead-weight and retrenchment has to be accepted as inevitable, however unfortunate it is, so long as it is not vitiated by considerations of victimization or unfair labour practice.

The management can retrench its employees only for proper reasons which means that it must not be actuated by any motive of victimization or an unfair labour practice. It is for the management to decide the strength of its labour force. If the number of employees exceeded the reasonable and legitimate needs of the undertaking it is open to the management to retrench them. Workmen may become surplus on the ground of rationalization or economy reasonably or bonafide adopted by the management or on the ground of other industrial or trade reasons, and the right to effect retrenchment cannot normally be challenged but when there is a dispute about the validity of retrenchment the impugned retrenchment must be shown as justified on proper reasons, i.e. that it was not capricious or without rhyme or reason."

Similar principles are laid down by Bombay High Court in the case of New Haven Steel Ball Corporation v/s R. Y. Yadav reported in 1999 F.J.R. page 14.

18. From the ration laid down by the Hon'ble Supreme Court and High Court, it is once again clear that it is within the managerial discretion of an employer to re-organise and arrange his business, in the manner he considers best. So long it is done in bonafide it is not competent for the Tribunal or the Labour Court to question its propriety and if the re-organisation results in any surplusage of employees, no employer is expected to carry such burden of economic non-viability through out and the retrenchment has to be accepted as inevitable however unfortunate it is, so long it is not vitiated with vicious or unfair labour practice. In the present case the employer has specifically stated that on account of the total computerisation of the work of maintenance of cylinder records at the factory establishment of the employer, for the purpose of economy and convenience, decided to reorganise the work and after re-distribution and re-organisation of the said work the services of the workman in the category of clerks was found surplus and her services were terminated by way of retrenchment by letter dated 28-12-2000, by fully complying with the provisions of Sec. 25F. In view of the above, I am of the view that the workman has failed to prove that the action of the employer in terminating her services w.e.f., 1-1-2001 is illegal and unjustified. Issue No. 2 thus stands answered accordingly.

19. *Issue No. 3:* This issue pertains to the relief to be granted to the workman. It has been held by me that the workman has failed to prove that the termination of her services by the employer w.e.f. 1-1-2001 is in violation of Sec. 25(F) and Sec. 25(G) of the Industrial Disputes Act, 1947. I have also held that the workman has failed to prove that the action of the employer in terminating her services w.e.f. 1-1-2001 is illegal and unjustified. This being the case I hold that the workman is not entitled to any relief. I, therefore answer the issue No. 3 in the negative.

In the circumstances, I pass the following order.

ORDER

It is hereby held that the action of the management of M/s. Govind Poy Oxygen Limited, Margao-Goa, in terminating the services of Miss Sima M. Shirsikar, Clerk, with effect from 1-1-2001 is legal and justified. It is further held that the workman Miss Sima M. Shirsikar is not entitled to any relief.

No order as to costs. Inform the Government accordingly.

Sd/-
(Suhas Naik),
Presiding Officer,
Labour Court–II.

Notification

No. 28/6/2005-LAB/570

The following Award passed by the Industrial Tribunal of Goa, at Panaji-Goa on 28-7-2006 in reference No. IT/49/94 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Hanumant T. Toraskar, Under Secretary (Labour).

Porvorim, 25th August, 2006.

IN THE LABOUR COURT – II
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Suhas Naik, Hon'ble Presiding Officer)

Ref. No. IT/49/94

Shri Ramdas Naik,
Represented through his legal representative
And widow Mrs. Rajavi Ramdas Naik
Mapari, Betki, Marcella, Goa. ... Workman/Party I

V/s

Goa Bagayatdar Sahakari Kharedi
Vikri Saunstha Maryadit. ... Employer/Party II

Workman/Party I - Represented by Adv. Shri Bhise.

Employer/Party II - Represented by Adv. Shri A. V. Nigalye.

Dated: 28-7-2006.

AWARD

The Government of Goa by order dated 15-3-94 bearing No. 28/7/94-LAB referred the following dispute for its adjudication:

"(1) Whether the action of the management of M/s. Goa Bagayatdar Sahakari Kharedi Vikri Society Ltd., Ponda, Goa, in terminating the services of Shri Ramdas G. Naik Mapari, with effect from 10-7-1993, is legal and justified ?

(2) If not, to what relief the workman is entitled ?"

2. On receipt of the reference a case was registered under No. IT/49/94 and the registered A.D. notices were issued to the parties. Pursuant to the notices, the parties remained present before the court and the workman/Party I (for short, "workman") filed his statement of claim at Exb. 3. The facts of the case in brief as pleaded by the workman are that he was employed with the employer/Party II (for short, 'employer') as a workman at its Ponda establishment. That the workman has studied up to standard V in Marathi and that he cannot read and understand English language and for understanding English, he has to take the assistance of others. That he can read, write and understand Marathi. That the employer terminated his services by letter dated 10-7-1993. That the termination of his services is an act of victimization, as the workman had filed a claim application claiming an amount of Rs. 854/- from the Labour Court. That the employer vide letter dated 11-1-1993 issued charge-sheet to the workman on false and concocted charges. That the domestic inquiry was conducted against the workman in gross violation of the principles of natural justice. That he was not explained the procedure of inquiry, nor he was informed that he can take the assistance of any co-worker. That he was denied assistance of the lawyer in the inquiry. That the findings submitted by the Inquiry Officer are perverse. That by letter dated 1-6-1993 the Managing Director of the employer, informed the workman about the inquiry findings of the Enquiry Officer and by letter dated 5-6-1993 the employer imposed the punishment of termination of his service. That the penalty of termination of his services is shockingly disproportionate and the termination is illegal. The workman prayed for reinstatement with full back wages.

3. The employer filed his written statement at Exb. 5. In the written statement the employer denied that the workman was not conversant with the English and that he was unable to read and understand the English. The employer stated that the workman had made several representations to the Enquiry Officer in English and the same are part of the inquiry records. The employer denied that the termination of the services of the workman was an act of victimization or an act of vengeance or an act to take the revenge for filing the claim application before the Labour Court. The employer stated that the workman committed serious acts of misconducts, for which a proper inquiry was conducted by appointing an independent Enquiry Officer. That the said Enquiry Officer submitted his findings on 27-4-1993 holding the workman guilty of the charges leveled against him. The employer stated that the said inquiry report was furnished to the workman by letter dated 1-6-1993. That the workman filed his reply to this letter by his letter dated 5-6-1993, requesting the employer not to impose any major penalty. That the said representation of the workman was not considered satisfactory and the employer by order dated 10-7-1993 terminated the services of the workman considering the gravity of the proved misconducts. The employer denied that the inquiry was conducted in violations of the principles of natural justice. The employer also denied that the termination is illegal or bad in law. The workman filed rejoinder at Exb. 6.

4. On the pleadings of the parties following issues were framed at Exb. 7.

1. Whether Party I proves that the domestic enquiry conducted against him is not fair and proper ?

2. Whether the Party I proves that the termination of his services by Party II is by way of victimization and out of vengeance ?

3. Whether the charges of misconduct leveled against Party I are proved to the satisfaction of the Tribunal by acceptable evidence.

4. Whether Party I proves that the termination of his services by Party II w.e.f. 10-7-1993 is not legal and justified ?

4-A Whether the Party II proves that it is not an industry within the meaning of Sec. 2(J) of the Industrial Dispute Act, 1947 nor an industrial establishment within the meaning of Sec. 2(K) of the said Act and hence this Tribunal has no jurisdiction to decide the reference ?

5. Whether Party I is entitled to any relief ?

6. What Award ?

5. After framing the issues the evidence was led before this Court by the workman and the case was fixed for evidence of the employer. Thereafter on 21-10-2004 the workman stated that they are exploring the possibilities of settlement with the employer and hence the case was adjourned and was fixed for settlement at the request of both parties. Thereafter on account of superannuation of the earlier Presiding Officer the present case was taken up before this Court as per the order of appropriate Government dated 22-2-2006. The notices were issued again to the parties by this Court. Both parties remained present before this Court. Adv. Shri Bhise appearing for the workman filed an application before this Court dated 25-7-2006 Exb. 14 stated that the workman Shri Ramdas Naik has expired on 7-4-2005 leaving behind his wife as only surviving legal heir. Along with the said application the death certificate was also produced dated as 13-1-2006 and prayed that the wife of deceased workman be brought on record. The employer gave no-objection on 25-7-2006 and accordingly the application filed by the Adv. for workman was allowed and wife of the deceased workman Smt. Rajavi Ramdas Naik was brought on record. Thereafter both parties submitted that they have settled the dispute amicably and filed the consent terms at Exb. 15.

6. I have gone through the terms of the settlement which are duly signed by the parties and I am satisfied that the said terms are certainly in the interest of the workman. I therefore accept the submissions made by the parties and pass the Consent Award in terms of the settlement dated 25-7-2006 Exb. 15.

ORDER

1. The Party II shall pay to Mrs. Rajavi Ramdas Naik a sum of Rs. 60,000/- (Rupees Sixty thousand only) in full and final settlement of the claim of late Ramdas Naik in Reference No. IT/49/94 pending before the Hon'ble Industrial Tribunal, Government of Goa at Panaji, Goa.

2. Out of the said sum of Rs. 60,000/- (Rupees Sixty thousand only) the Party II shall draw a cheque of Rs. 8,000/- (Rupees Eight thousand only) on behalf of Party I to Shri D. P. Bhise, Advocate, towards his legal fees payable to him by the Party I and hand over the said cheque to Shri D. P. Bhise. The Party II shall pay the remaining amount of Rs. 52,000/- (Rupees Fifty two thousand only) to Mrs. Rajavi Ramdas Naik.

3. Mrs. Rajavi Ramdas Naik and Shri D. P. Bhise shall issue receipts to the Party II in acknowledgment of having received the said sum of Rs. 52,000/- (Rupees Fifty two thousand only) and Rs. 8,000/- (Rupees Eight thousand only).

4. Mrs. Rajavi Ramdas Naik declares that she is the sole legal representative of late Ramdas Naik. She further declares and undertakes that in the event of any other person claiming to be the legal representative of late Ramdas Naik, she shall, at all times hereafter, keep the Party II indemnified of such claim and demands.

5. Mrs. Rajavi Ramdas Naik hereby agrees and declares that all her disputes and the disputes of late Ramdas Naik in Reference No. IT/49/94 have been conclusively settled with the signing of these Consent Terms and she has no further claim or demand against the Party II of any nature whatsoever.

6. The parties agree to file these Consent Terms in the Hon'ble Labour Court, Government of Goa at Panaji Goa in Reference No. IT/49/94 with request to pass Consent Award in terms thereof.

No order as to cost. Inform the Government accordingly.

Sd/-
(Suhas Naik),
Presiding Officer,
Labour Court–II.

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